TONI HUTCHESON MOORE ET AL.,

AMERICAN MUSTANG & BURRO ASSN., INC.

IBLA 97-541, 97-547 Decided October 29, 1998

Appeals from a Notice of Intent to remove Wild Horses issued by the Little Snake Resource Area Manager, Bureau of Land Management, Craig, Colorado. EA No. CO-016-95-060.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

   A BLM plan for removing wild horses from a herd management area will be affirmed where BLM has concluded that removal is necessary to restore the range to a thriving ecological balance, and the appellants have failed to demonstrate that BLM committed any error in reaching such conclusion.

2. Res Judicata--Rules of Practice: Appeals: Effect of

   Under the doctrine of administrative finality — the administrative counterpart of the doctrine of res judicata — when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

APPEARANCES: Toni Hutcheson Moore, Donald E. Moore, Barbara M. Flores, Dave Hillberry, pro sese; Jennifer E. Rigg, Esq., Office of the Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Toni Hutcheson Moore, Donald E. Moore, and Judy Cady (IBLA 97-541), and American Mustang & Burro Association, Inc. (IBLA 97-547) have filed separate appeals from a July 17, 1997, Notice of Intent to Remove Wild Horses (Notice) issued by the Little Snake Resource Area Manager (LSRA),

Bureau of Land Management (BLM), Craig, Colorado. That Notice set forth BLM's plan to remove wild horses which have established permanent residence outside the boundaries of the Sand Wash Herd Management Area (HMA).

In an October 24, 1997, Order denying Appellants' motion to stay the effect of the Notice, the Board observed that the planned removal was a continuation of the August 31, 1995, Sand Wash HMA Wild Horse Removal Plan; the August 31, 1995, Environmental Assessment (EA) for the Gather and Selective Removal of Wild Horses from the Sand Wash HMA (EA No. CO-016-95-060); and the Full Force and Effect Decision Record for EA No. CO-016-95-060, signed August 31, 1995, by the LSRA Area Manager. In American Mustang & Burro Association, Inc., Dave Hillberry, 144 IBLA 148 (1998), we affirmed BLM's Sand Wash HMA Wild Horse Removal Plan.

The only issue before the Board in the present appeal is whether BLM's decision to remove wild horses outside the boundaries of the HMA, as announced in the Area Manager's July 17, 1997, Notice, was integral to the Sand Wash HMA Wild Horse Removal Plan. We find that it was.

According to the Notice, the removal "adheres to wild horse management objectives contained in the June 1989 LSRA Resource Management Plan and Record of Decision and in the 1982 Sand Wash Basin Herd Management Area Plan." The purpose of BLM's action was to remove wild horses from the Snake River Allotment and to limit wild horse distribution to the Sand Wash HMA boundaries. The Area Manager conservatively estimated that 33 animals would be involved. Horses 9 years old and younger would be made available for adoption and those 10 years old or older would be released within the Sand Wash HMA. A public hearing was scheduled for August 22, 1997, to address the use of helicopters for the gather. On August 22, 1997, a combined public hearing and public meeting was held at the White River Resource Area Office in Meeker, Colorado, to discuss upcoming wild horse gathers. (BLM Answer at 6.)

The Appellants in IBLA 97-541 assert that BLM failed to assess biotic needs, habitat requirements and "ignored the law" when setting the boundaries for wild horse populations in the LSRA. They argue further that BLM has no authority to place horses through adoption and has presented no monitoring data to show what is a thriving ecological balance. Appellants contend that BLM's selection of horses by age is contrary to numerous Federal statutes. In addition, Appellants contend that removal of the horses from the Snake River Allotment is arbitrary and capricious in that it is costly, intrusive, and stressful to the horses subject to removal. Appellants complain of an absence of monitoring, genetic testing and a study of herd dynamics.

The Appellants assert that "this roundup was conducted without the benefit of an environmental assessment, gather plan and current monitoring data, in direct violation of the law." Appellants allege that BLM's action was based on inaccurate data, and that it overstated the number of horses involved by a factor of three.

The Appellants in IBLA 97-547 request a ruling on the legality of "full force and effect" status. They also contend that BLM may not remove wild horses and burros from areas in which they were found in 1971. Finally, they argue that horses 10 years old or older may not be released into the Sand Wash HMA without an environmental assessment.

In its Answer, BLM states that the gather was conducted beginning on September 8, 1997, without injury to the horses. Eighteen horses were removed from the Snake River Allotment. Seventeen horses were removed to the Sand Wash Holding Facility, 13 were offered for adoption and 4 were released into the Sand Wash HMA. One horse jumped the Sand Wash HMA boundary fence back into the HMA. (Answer at 6.)

BLM asserts that the Snake River Allotment Gather was part of the continuing implementation of the 1995 Decision. Referring to the August 31, 1995, final Gather Plan and EA, BLM notes that these documents specifically discussed the removal of horses that had established occupancy outside the HMA boundaries. BLM notes that the 1997 gather required no additional National Environmental Policy Act of 1969 analysis because (1) removal of horses from outside the Sand Wash HMA was specifically anticipated and analyzed in the previous gather plan and decision record, (2) the previous EA had considered a reasonable range of alternatives, (3) there were no significant changes in the affected environment, (4) the 1997 gather would not change the previous cummulative impact analysis, and (5) public involvement in the previous BLM planning had been extensive. (Answer at 9-10.)

BLM contends that Appellants' arguments go to the 1995 Gather Plan and Decision Record and are barred by the doctrine of administrative finality.

[1] BLM is required by section 3(b)(2) of the Wild Free Roaming Horse and Burro Act, as amended, 16 U.S.C. § 1333(b)(2) (1994), to remove "excess" wild horses from an area of the public lands when it is demonstrated, by current available information, that to do so is necessary to restore the range to a thriving natural ecological balance between wild horse and burro populations, wildlife, domestic livestock, and vegetation, and protect it from the deterioration associated with an overpopulation of wild horses. See 16 U.S.C. § 1332(f) (1994); 43 C.F.R. §§ 4700.0-6(a) and 4720.1; Animal Protection Institute of America, 117 IBLA 208, 216 (1990). Excess wild horses are those that exceed an appropriate management level, which is designed to achieve the objectives of the statute. 16 U.S.C. § 1333(b)(2) (1994); Craig C. Downer, 111 IBLA 332, 336 (1989).

The arguments presented in the appeals now before us were presented and fully addressed in American Mustang & Burro Association, Inc., Dave Hillberry, supra, at 150-55. As we stated in that decision, the burden is upon the person challenging a BLM wild horse removal plan to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its analysis, or that the decision generally is not supported by a record that shows that BLM considered all relevant factors and acted on the basis

of a rational nexus between the facts found and the choice made. American Horse Protection, Inc., 134 IBLA 24, 27 (1995). That burden is not carried by mere expressions of disagreement with BLM's analysis and conclusions. Animal Protection Institute of America, 117 IBLA 4, 8 (1990).

[2] American Mustang & Burro Association, Inc., Dave Hillberry, supra, also included a ruling that the Area Manager's decision placing the removal plan into full force and effect was appropriate. Id. at 154. Because the issues presented by Appellants were adjudicated in American Mustang & Burro Association, Inc., Dave Hillberry, they will not be reconsidered here. The doctrine of administrative finality, like its judicial counterpart, res judicata, bars reconsideration of prior actions which were or could have been subject to direct review, in subsequent or collateral proceedings, except upon a showing of compelling legal or equitable reasons. Keith Rush, 125 IBLA 346, 351 (1993), and cases there cited; Melvin C. Helit v. Gold Fields Mining Corp., 113 IBLA 299, 308-09, 97 I.D. 114-15 (1990).

As we observed in our October 24, 1997, Order, the only issue before the Board in the present appeal is whether BLM's decision to remove wild horses outside the boundaries of the HMA, as announced in the Area Manager's July 17, 1997, Notice, was proper. We find that the 1997 gather was one step in the continuing implementation of the 1995 Decision Record. That Decision Record has been comprehensively reviewed by the Board. See American Mustang & Burro Association, Inc., Dave Hillberry, supra. Further discussion would be superfluous.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the July 17, 1997, Notice of Intent to Remove Wild Horses issued by the Little Snake Resource Area Manager is affirmed.

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James P. Terry
Administrative Judge

I concur:

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T. Britt Price
Administrative Judge